Sunrise & Co Pte Ltd & Anor v Marco Shoe Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-830 OF 1994
KAMALANATHAN RATNAM JC
6 JUNE 1997

Contract *— Breach — Damages/specific performance — Breach of settlement agreement by defendant — Whether plaintiffs had proprietary rights over moulds used by defendant to manufacture plaintiffs' goods — Whether there was sufficient consideration moving from the plaintiffs to the defendant for the signing of the settlement agreement — Whether plaintiffs entitled to specific performance and damages*

The first plaintiff is and was the licensee and distributor in Singapore, Malaysia, Hong Kong and Indonesia of Yonex and Ascot sports shoes ('the shoes'). The second plaintiff was a related company of the first plaintiff and the distributor in Malaysia of the shoes. The plaintiffs entered into a manufacturing agreement with the defendant to manufacture, package and supply for the plaintiffs sports shoes bearing the trade mark 'Yonex'. Although the agreement specifically referred to Yonex shoes, the defendant also manufactured and supplied to the plaintiffs Ascot shoes on the same terms and conditions. As a result of some dissatisfaction on the part of the plaintiffs with regard to the quality of the shoes manufactured and supplied to the plaintiffs by the defendant, both the parties agreed to a settlement agreement. The terms of the settlement agreement provided that the first plaintiff would first make a partial payment to the defendant and one Tasima Footwear Sdn Bhd, upon which the defendant would accept all future returns of B grade shoes and all defective shoes from the plaintiffs and reimburse the plaintiffs the cost of these shoes. The defendant must then allow the plaintiffs to destroy B grade shoes and the defective shoes in the defendant's premises. It was also provided in the settlement agreement that the defendant would return to the plaintiffs three sets of moulds belonging to the plaintiffs and held in trust by the defendant. However, in breach of the settlement agreement, the defendant refused to return the moulds and to destroy the defective shoes in their possession as agreed. The plaintiffs were told by the then managing director of the defendant that he had no intention of returning the moulds to the plaintiffs until full payments were made to the defendant. The plaintiffs sought specific performance under the settlement agreement and damages arising from the defendant's breach.

Held, ordering specific performance of the settlement agreement and compensation for the plaintiffs:

(1) The parties had intended that the agreement for the Ascot shoes was to be on the same terms as the agreement for the Yonex shoes. On the facts, it was clear that the defendant had clearly breached the terms of the settlement agreement. Notwithstanding

the defendant's breach of the settlement agreement, the plaintiffs did not accept the defendant's breach as a discharge of the agreement and had all the while indicated their intention to treat the settlement agreement as still in force. Therefore, the plaintiffs were entitled to specific performance of the terms of the settlement agreement and to claim for damages for the breach rather than accept the repudiation and termination of the settlement agreement (see pp 635D–E and 642B–C).

(2) It was reasonable that the plaintiffs had proprietary rights over the moulds because the moulds were used to make the plaintiffs' shoes and the plaintiffs would not want others who were not authorized to use them. The moulds for the shoes did in fact belong to the plaintiffs as the terms of the settlement agreement stated that the defendant had expressly agreed to return the moulds to the plaintiffs without any reservation as to the ownership of the same. The moulds ought to have been returned immediately once the plaintiffs had paid the initial payments in full. By not having the moulds during the festive period from the end of 1994 to early 1995, the plaintiffs had suffered loss and damage. Based on the plaintiffs' uncontested computation, the damages for the delay in returning the moulds amounted to RM509,730.

As for the defective shoes, the total compensation due to the plaintiffs was RM101,432.14. The defendant was also ordered to destroy the 1,584 pairs of defective shoes unaccounted for (see pp 634D–G, 635H, 636A–B, 638C–E and 639F–G).

(3) There was sufficient consideration moving from the plaintiffs to the defendant for the signing of the settlement agreement and the defendant had thereby obtained the benefit of a direct obligation which it could enforce. It was clear that the intention of the parties was that by signing the settlement agreement, the defendant would be gaining an advantage of continuing the relationship. In any case, the defendant and the plaintiffs had acted on the basis of the settlement agreement and the defendant was estopped by conduct from decrying the settlement agreement (see pp 640G and 641C–D).

(4) This was a proper case for the court to exercise its discretion to order specific performance of the settlement agreement as the plaintiffs could not be satisfied with pure monetary compensation. It was necessary for the protection of their reputation that the defective shoes be destroyed and not be allowed to circulate in the market. In any case, the defendant had already been compelled by the court to specifically perform the settlement agreement at the interlocutory stage (see pp 641G, I and 642A).

[Bahasa Malaysia summary

Plaintif pertama adalah pemegang lesen dan pengedar kasut sukan Yonex dan Ascot ('kasut tersebut') di Singapura, Malaysia, Hong Kong dan Indonesia. Plaintif kedua adalah syarikat berkaitan plaintif

A pertama dan pengedar kasut tersebut di Malaysia. Plaintif-plaintif telah mengikat suatu perjanjian pengilangan dengan defendan untuk mengilang, membungkus dan membekal kasut sukan yang membewa tanda niaga 'Yonex' untuk plaintif-plaintif. Walaupun perjanjian itu merujuk secara khusus kepada kasut Yonex, defendan juga telah mengilang dan membekal kasut Ascot kepada plaintif-plaintif dengan B terma dan syarat yang sama. Akibat ketidakpuasan hati pada pihak plaintif-plaintif mengenai mutu kasut yang dikilang dan dibekalkan kepada plaintif-plaintif oleh defendan, kedua-dua pihak telah bersetuju kepada perjanjian penyelesaian. Terma perjanjian penyelesaian memperuntukkan bahawa plaintif pertama akan mula membuat C sebahagian bayaran kepada defendan dan Tasima Footwear Sdn Bhd, yang mana defendan akan menerima segala pulangan kasut gred B dan semua kasut defektif daripada plaintif-plaintif dan membayar balik kos kasut-kasut ini kepada plaintif-plaintif. Defendan mestilah membenarkan plaintif-plaintif memusnahkan kasut gred B dan kasut defektif dalam premis defendan. Adalah juga diperuntukkan D dalam perjanjian penyelesaian bahawa defendan akan memulangkan tiga set acuan kepunyaan plaintif-plaintif dan yang dipegang atas amanah oleh defendan kepada plaintif-plaintif. Namun demikian, berlanggaran dengan perjanjian penyelesaian tersebut, defendan enggan memulangkan acuan dan untuk memusnahkan kasut defektif E dalam milik mereka seperti yang dipersetujui. Plaintif-plaintif diberitahu oleh pengarah urusan defendan pada masa itu bahawa dia tidak berhasrat memulangkan acuan kepada plaintif-plaintif sehingga bayaran penuh dibuat kepada defendan. Plaintif-plaintif meminta pelaksanaan spesifik di bawah perjanjian penyelesaian dan ganti rugi yang timbul daripada kemungkiran defendan.

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Diputuskan, memerintahkan pelaksanaan spesifik perjanjian penyelesaian dan pampasan untuk plaintif-plaintif:

(1) Pihak-pihak telah berhasrat bahawa perjanjian untuk kasut Ascot hendaklah dengan terma yang sama dengan perjanjian untuk G kasut Yonex. Atas fakta-fakta, adalah nyata bahawa defendan telah melanggar terma perjanjian penyelesaian. Tanpa mengira kemungkiran perjanjian penyelesaian oleh defendan, plaintif-plaintif tidak menerima kemungkiran defendan sebagai satu pelepasan perjanjian dan telah sentiasa menunjukkan hasrat mereka untuk menganggap perjanjian penyelesaian tersebut masih H berkuatkuasa. Maka, plaintif-plaintif berhak mendapat pelaksanaan spesifik terma perjanjian dan untuk menuntut ganti rugi atas kemungkiran berbanding dengan menerima penolakan dan penamatan perjanjian penyelesaian (lihat ms 635D–E dan 642B–C).

I (2) Adalah munasabah bahawa plaintif-plaintif mempunyai hak ketuanpunyaan atas acuan kerana acuan digunakan untuk membuat kasut plaintif-plaintif dan plaintif-plaintif tidak inginkan mereka yang tidak diberi kuasa menggunakannya. Acuan untuk kasut tersebut memang dimiliki oleh plaintif-plaintif kerana terma

perjanjian penyelesaian menyatakan bahawa defendan telah bersetuju secara nyata untuk memulangkan acuan kepada plaintif-plaintif tanpa sebarang keraguan atas milikan yang sama. Acuan sepatutnya dikembalikan sebaik saja selepas plaintif-plaintif telah membuat bayaran permulaan sepenuhnya. Tanpa mempunyai acuan-acuan semasa musim perayaan dari akhir tahun 1994 sehingga awal tahun 1995, plaintif-plaintif telah mengalami kerugian dan kerosakan. Berdasarkan pengiraan plaintif-plaintif yang tidak dicabar, ganti rugi untuk kelewatan dalam memulangkan acuan berjumlah RM509,730.

Mengenai kasut defektif itu, jumlah pampasan yang harus dibayar kepada plaintif-plaintif adalah RM101,432.14. Defendan juga diperintahkan memusnahkan 1,584 pasang kasut defektif yang tidak dapat dikesan (lihat ms 634D–G, 635H, 636A–B, 638C–E dan 639F–G).

(3) Terdapat balasan yang memadai yang beralih daripada plaintif-plaintif kepada defendan untuk menandatangani perjanjian penyelesaian dan defendan telah memperolehi manfaat obligasi terus yang boleh dikuatkuasakannya. Nyata bahawa hasrat pihak-pihak ialah bahawa dengan menandatangani perjanjian penyelesaian, defendan akan mendapat kelebihan meneruskan perhubungan itu. Walau bagaimanapun, defendan dan plaintif-plaintif telah bertindak atas dasar perjanjian penyelesaian dan defendan diestop oleh kelakuan daripada mencela perjanjian penyelesaian (lihat ms 640G dan 641C–D).

(4) Ini merupakan suatu kes yang wajar untuk mahkamah melaksanakan budi bicaranya untuk memerintahkan pelaksanaan spesifik perjanjian penyelesaian kerana plaintif-plaintif tidak boleh dipampas dengan wang semata-mata. Adalah perlu untuk perlindungan reputasi mereka bahawa kasut defektif dimusnahkan dan tidak dibenarkan diedarkan dalam pasaran. Walau bagaimanapun, defendan telah pun diwajibkan oleh mahkamah untuk melaksanakan perjanjian penyelesaian secara khusus di peringkat interlokutori (lihat ms 641G, I dan 642A).]

Notes

For a case on damages/specific performance, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1641.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Lim Sin Oo & Ors v Cheah Tjeng Siong [1989] 2 MLJ 44 (refd)

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd & Anor [1978] 3 All ER 1170 (refd)

Williams v Roffey Bros & Nicholls (Contractors) Ltd [1990] 1 All ER 512 (refd)

Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Ong Chee Kwan (*Brenda Chong* with him) (*Lee Ong & Kandiah*) for the plaintiffs.

K Santhrasergaran (*R Mahendran* with him) (*Rastam Singa & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

The first plaintiff is and was at all material times the licensee and distributor in, inter alia, Singapore, Malaysia, Hong Kong and Indonesia of 'Yonex' and 'Ascot' sports shoes ('the shoes'). The second plaintiff is a related company of the first plaintiff and the distributor in Malaysia of the said shoes. On or about 9 March 1992, the plaintiffs entered into a manufacturing agreement with the defendant to manufacture, package and supply for the plaintiffs sports shoes bearing the trade mark 'Yonex'. Although the agreement specifically referred to only Yonex shoes, the defendant also manufactured and supplied to the plaintiffs Ascot shoes on the same terms and conditions.

Notwithstanding the fact that the agreement was executed between the second plaintiff and the defendant, nevertheless at all material times, the defendant dealt with the first plaintiff in respect of the manufacture and supply of the sports shoes and looked to the first plaintiff for payment.

As a result of some dissatisfaction on the part of the plaintiffs with regard to the quality of the shoes manufactured and supplied to the plaintiffs by the defendant and with a view to settle the accounts between themselves so that the parties could 'move ahead', the plaintiffs and the defendant agreed to a settlement agreement.

The settlement agreement

Essentially under the settlement agreement dated 14 June 1994 (CABD 32), the first plaintiff would make a partial payment of RM374,500.20 and RM184,412.25 to the defendant and one Tasima Footwear Sdn Bhd ('Tasima') respectively. In return, the defendant, upon receipt of the above payments would:

(a) accept all future returns of B grade shoes and all defective shoes from the plaintiffs and reimburse the plaintiffs the cost of these shoes based on a formula, that is — Sunrise's (the plaintiffs') costs x quantity returned;

(b) allow the plaintiffs to destroy B grade shoes and the defective shoes in the defendant's premises amounting to not less than 18,278 pairs and that such operations to start immediately after the plaintiffs had effected payments under (a) above; and

(c) return to the plaintiffs three sets of moulds belonging to the plaintiffs and held in trust by the defendant.

Once the defendant had fulfilled conditions (a) and (b), the first plaintiff would pay the balance sum of RM366,007.64. The first plaintiff, in accordance with the settlement agreement, effected payment of the sums of RM374,500.20 and RM184,412.25 on 19 July 1994 and on 22 July 1994 respectively. However, in breach of the settlement agreement, the defendant refused to return the moulds and to destroy the defective shoes in their possession as agreed to earlier.

Issues before the court

The plaintiffs claim for specific performance under the settlement agreement and for damages arising from the defendant's breach of the settlement agreement.

The evidence

PW1 in his evidence explained that the unilateral term from the defendant that the payments were to be made before 17 June 1994 was never accepted by the plaintiffs and in any event retracted by the defendant. Documentary evidence show that the defendant never raised the payment date as an issue. It is not disputed that the plaintiffs had discharged their obligations under the settlement agreement in the payment of the initial sum of RM374,500.20 and RM184,412.25 to the defendant and to Tasima. These payments were completed by 22 July 1994. On the same day, the plaintiffs wrote to the defendant informing it that the plaintiffs were prepared to destroy the shoes and proposed 28 July 1994 as the commencement date. On the other hand, evidence disclosed showed that the defendant had breached its obligations under the settlement agreement by refusing to do the following:

(a) Deliver to the premises of the second plaintiff the moulds for making the soles of:
   (i) Yonex Aerotus 740 sports shoes;
   (ii) Ascot Pro-Squash sports shoes; and
   (iii) Ascot Grandslam sports shoes.

(b) Permit the plaintiffs' representatives access to the defendant's premises to commence destruction in the presence and under the directions of the plaintiffs' representatives of 18,278 and 699 pairs of defective Yonex and Ascot sports shoes.

(c) Accept all further defective shoes that come into the plaintiffs' possession and compensate the plaintiffs in accordance with the formula: costs to plaintiff x quantity of shoes.

The defendant only complied with (a) on 23 September 1994 after the plaintiffs had applied to court and had obtained an ex parte injunction against the defendant on 20 September 1994. In respect of (b), the defendant had refused to comply with the court order dated 20 September

1994 and sought to challenge the same. After the inter partes hearing, the ex parte order was affirmed on 10 April 1995 and despite the inter partes order, the defendant did not comply with the destruction of the shoes within the stipulated time and only proceeded to do so after the plaintiffs had commenced contempt proceedings. In respect of (c), the defendant has to date refused to accept delivery of further defective shoes from the plaintiffs amounting to 2,391 pairs of shoes. The plaintiffs are seeking a final order for the defendant to specifically perform this part of their obligation. The defendant has returned to the plaintiffs the moulds for Yonex Aerotus 740, Ascot Pro-Squash and Ascot Grandslam sports shoes. The last was returned late — that is on or about 23 September 1994 — and the plaintiffs are claiming loss on account of this. Pursuant to the inter partes order dated 10 April 1995, the defendant had destroyed 18,279 and 699 pairs of defective Yonex and Ascot sports shoes.

Agreement for the Yonex sports shoes

The agreement for the manufacture and supply of the Yonex shoes is dated 9 March 1992. The essential terms and conditions of the agreement are as follows:

(i) The term for the agreement is for a period of three years (see cl 2).

(ii) The plaintiffs shall place an initial order of 60,000 pairs of shoes (see cl 3).

(iii) In the event the shoes manufactured by the defendant do not comply with the required specifications and standard ('C grade shoes'), the same shall be rejected and shall be destroyed by the defendant at the defendant's costs ('defective shoes') and the defendant shall be responsible for the replacement of the defective shoes to the plaintiffs (see cl 10).

(iv) In the event that the shoes manufactured conformed to the specifications and standards but nevertheless contained minor defects ('B grade shoes'), the plaintiffs may direct the defendant to destroy the shoes at the defendant's costs and the defendant shall be responsible for the replacement thereof.

(v) In the event that the shoes manufactured conformed to the plaintiffs' specifications and standards without any minor defects ('A shoes'), if the same were subsequently returned by the dealers due to growth of fungus, these shoes can be returned to the defendant for destruction at the defendant's costs.

(vi) All the moulds provided by the plaintiffs to the defendant for the purpose of manufacturing, supplying and delivering the Yonex sports shoes shall belong to the plaintiffs and the defendant shall deal with the moulds in accordance with the directions of the plaintiffs or delivered and surrendered back to the plaintiffs upon the termination of the agreement (see cl 18).

In his evidence, PW1 specifically denied the defendant's assertion that the agreement was only for a maximum order of 60,000 pairs. In fact, his

evidence that the 60,000 pairs of shoes were just 'an initial order' was never challenged by the defendant. PW1's evidence was that although the agreement was executed between the second plaintiff and the defendant, for all practical purposes, the defendant only dealt with the first plaintiff and had looked to it for payment; and in fact, all payments under the agreement were indeed made by the first plaintiff. The second plaintiff would develop the shoes with the defendant for final approval by the first plaintiff. I therefore reject the defendant's contention that the agreement was between the defendant and the second plaintiff only and that the defendant had no dealings with the first plaintiff. Correspondences marked CABD 3 to CABD 11 show that both the first and second plaintiffs were involved in the agreement. With regard to the return of the 'A grade shoes', PW1 testified that this was the understanding and that the conduct of the parties throughout the agreement demonstrated and supported this arrangement. In any case, I find that the minutes of the meeting dated 3 June 1993 (CABD 9–11) supports this arrangement. PW1 testified that at the first plaintiff's request, the defendant had previously ordered the moulds to make the shoe soles from mould makers abroad and that these moulds were paid for by the first plaintiff directly and evidence of such payment was tendered (CABD 174). It is therefore reasonable, and I do so find, that the plaintiffs should have proprietary rights over these moulds because these moulds are used to make the plaintiffs' models and the plaintiffs would not want others, who are not authorized, to use them. However, with regard to the moulds for the Ascot Grandslam shoes, PW1 stated that the payments were made by the defendant factoring the costs into the shoes for an agreed quantity of shoes. In any event, under the terms of the settlement agreement, the defendant had agreed to return the moulds to the plaintiffs upon the initial payments being made and they were so made. I find further support in holding that all these moulds do in fact belong to the plaintiffs by referring to the terms of the settlement agreement whereby the defendant had expressly agreed to return the moulds to the plaintiffs without any reservation as to the ownership of the same. With regard to the formula for the compensation, I accept PW1's evidence that the compensation is based on costs to plaintiffs x quantity. In fact, this was agreed upon by the parties as shown in the minutes of the meeting held on 3 June 1993 (CABD 9 and 10) and as well as in the settlement agreement.

A B C D E F G H I

Agreement for the Ascot shoes

As for the manufacture and supply of the Ascot sports shoes, PW1 testified that although there was no written agreement between the parties, nevertheless the terms and conditions for the Ascot sports shoes were identical to that of the Yonex sports shoes. The reasons he gave as to why there was no formal written agreement were, that the Ascot trade mark registration searches were not completed in time and that the terms between the proprietor of the Ascot trade mark, that is Ascot International (S & F) of United Kingdom, and the plaintiffs, had not been finalized by that time. In addition, the moulds for the Ascot Pro-Squash model and the

A Ascot Grandslam model were only ordered around April 1992 and January 1993 respectively after the Yonex agreement. Hence, at the time of the Yonex agreement, the defendant could only manufacture the Yonex shoes. In any event, the agreed documentary evidence (CABD 9–18, 92–94 and 97–103) clearly suggested that the plaintiffs and the defendant had throughout their course of dealings dealt with the Ascot shoes on the same B terms as the Yonex shoes. Further, I find that the invoices and delivery orders from the defendant referred to the Ascot sports shoes and the amount therein was included in the initial payment as stated in the settlement agreement. Further, I am compelled to observe that no questions were put to PW1 that the terms and conditions for the manufacture and C supply of the Ascot sports shoes were different from the Yonex sports shoes.

The court's findings

I am satisfied, upon reviewing the evidence that the defendant had clearly breached the terms of the settlement agreement and that the defendant D had unilaterally set the deadline of 17 June 1994 for the plaintiffs to effect the two payments. I have no hesitation in concluding that the parties had intended that the agreement for the Ascot shoes was to be on the same terms as in the agreement for the Yonex shoes. I also find that the settlement agreement had the effect of terminating the parties' obligations under the Yonex and the Ascot agreements. I therefore find that the E plaintiffs are entitled to specific performance of the terms of the settlement agreement and to claim for damages for the breach rather than accept the repudiation and termination of the settlement agreement.

(1) Damages for the late delivery of moulds

F The defendant had acknowledged the receipt from the plaintiffs of RM374,500.20 and RM152,361.00 by their telefaxes of 19 and 20 July 1994 respectively. The remaining sum of RM32,051.25 was also remitted to the defendant on 22 July 1994. In the circumstances, the defendant ought to have returned the moulds to the plaintiffs on or about 23 July 1994 G since both the second plaintiff and the defendant are in Kuala Lumpur and Klang respectively. The defendant released the moulds to the plaintiffs on or about 23 September 1994 (CABD 233) after a delay of about 63 days and that too after contempt proceedings were threatened. Pursuant to the settlement agreement, the moulds ought to have been returned immediately after 22 July 1994 when the plaintiffs had paid in full the initial payments. H PW1 informed the court that he was told by Mr Balasingam, the then managing director of the defendant and who had played a prominent part in this case, that he had no intention of returning the moulds to the plaintiffs until full payments were made to the defendant. This was clearly in conflict with the settlement agreement. However, the defendant did not I call Mr Balasingam to refute this contention. I find that this is a clear instance for this court to invoke s 114(g) of the Evidence Act 1950 against the defendant and to presume that if Mr Balasingam had indeed been called, he would have confirmed that such a statement was indeed made.

I find that the plaintiffs had indeed suffered loss and damage by not having the moulds during the festive period being the end of 1994 to early 1995 when the Christmas and the New Year sales are followed hot on the heels by Hari Raya and Chinese New Year sales. By reason of the defendant's refusal to speedily return the moulds, the plaintiffs could not proceed to manufacture the sports shoes from other manufacturers as each of the manufacturers would require the moulds first before any production. I accept PW1's evidence that it was also not possible to make the shoes outside Malaysia for sale in Malaysia as the shipping and customs costs would make the same uneconomical. In addition, it would also take time to have new moulds to be made overseas and sent to Malaysia for the production. I also accept his evidence that normally at least six to eight weeks are required for the manufacture of fresh moulds and that the costs for the three sets would be about US$80,000. The defendant's action in refusing to deliver the moulds was clearly meant to jeopardize the plaintiffs' business. The defendant through its witness, DW2 (its production development manager), sought to undermine the plaintiffs' claim for damages under this head by asserting that even if the moulds were delivered early to the plaintiffs, the new manufacturer would be unable to manufacture the shoes without first having the 'last' which he said normally takes three to four months to manufacture.

According to DW2, in the manufacture of a shoe, one has to begin with the manufacture of the 'last'. Having identified the kind of 'last' one wants, only then does one progress to the design, that is the upper and bottom part of the shoe which is done by the mould. Therefore, the mould comes after the 'last' is manufactured. The 'last' is very important as each has its own specification and identification and there is no such thing as a 'common last'. For example, sports shoes require a 'last' that is comfortable for sports shoes. In fact, it was his evidence that it was the 'last' that determine the comfort of the shoes. Once the 'last' is identified then only can the mould be designed. In this case, he confirmed that the 'last' was designed by the defendant. Whilst agreeing that a new 'last' could be made to fit the said mould in this case, he maintained that the quality and comfort would never be the same. Under cross-examination, he agreed that it has been the defendant's practice to make shoes with the 'last' first. To a specific question as to whether if the plaintiffs took the said moulds to another manufacturer and asked him to manufacture the shoes using the existing 'last', he agreed it would be possible, at the sacrifice of comfort. When asked to what degree would the factor of comfort be affected if an existing 'last' is used, his answer was that it was very difficult for him to determine. He also agreed that a fresh 'last' could be done in two to three weeks if there was a mock-up sample available. PW1 described 'last' as a metal piece in the shape of a foot turned upside down. Over this 'last', the upper part of the shoe will be stretched and a piece of cardboard is placed on it and the upper part of the shoe is either sewed or glued. The purpose of the 'last' is to provide the fit and size for the shoe. Having heard the evidence of DW2, I am not satisfied with his explanation regarding the prominence that ought to be given to the 'last'. I accept that it could have been done in two to three weeks by a new manufacturer and that, had the

defendant returned the moulds in time, the plaintiffs' dealers would have been in time to place their orders for the Christmas and New Year sales and the other festive sales. I accept PW1's evidence that it normally takes six to eight weeks for the manufacturer to produce the shoes for each other. PW1 computed loss of damages under the following heads:

(a) Loss of a major distributor, Sykt Sukan Maju Sdn Bhd ('Sukan')

According to PW1, Sukan was one of the plaintiffs' main distributor in Malaysia. Sukan had a standing order for 3,000 shoes from the plaintiff every month for April to August 1994 (CABD 149–150). This was subsequently increased to 6,000 pairs each month (CABD 159). By reason of the plaintiffs' inability to supply to Sukan the 6,000 pairs of shoes, Sukan stopped buying from the plaintiffs altogether (CABD 173, 183 and 186).

It is the plaintiffs' case that their losses for the period October to December 1994 from Sukan alone is estimated at RM387,060. These figures are based on the quantities of shoes which Sukan had ordered from the plaintiffs but subsequently cancelled due to non-performance by the plaintiffs. The documents in support of the orders are set out in CABD 152–161, 169, 171, 182, 185 and 186. The profit figures for October to December 1994 are shown as CABD 170 where the top two tables show the quantities of shoes ordered and the bottom two tables show the gross profit.

Having considered the documentary evidence which were agreed and admitted and upon which there was no challenge, I accept the following as the plaintiffs' loss in profits:

	YONEX		ASCOT		RM
October 94	76,100	+	85,880	=	161,980
November 94	76,100	+	30,430	=	106,530
December 94	76,100	+	42,450	=	118,550
					387,060

(b) Cancellation of orders

According to PW1, quite apart from Sukan, the plaintiffs had also lost some order from other distributors. More specifically the following orders were lost:

(i) Amtel Exports Sdn Bhd cancelled their 3,000 pairs of World Champion shoes (CABD 188).

(ii) Sunrise & Co Pte Ltd in Indonesia cancelled their 5,000 pairs of World Champion shoes and 5,000 All England shoes (CABD 187).

(iii) Sunrise Sports Sdn Bhd was unable to supply an additional 3,000 pairs of Yonex Aerotus 740 shoes to their customers (CABD 183).

By reason of these cancellations, the plaintiffs suffered a loss of RM122,670. Again based on the agreed documents, I accept the plaintiffs' loss in profits due to cancellations of orders as RM122,670 on the following basis:

Party	Quantity	Type	Unit Price (See CABD 170)	Loss of Profit (RM)
Amtel Exports	5,000	World Champion	RM4.64	23,200
Sunrise & Co	5,000	World Champion	RM4.64	23,200
	5,000	All England	RM8.09	40,450
Sunrise Sports	3,000	Yonex Aerotus 740	RM11.94	35,820
				122,670

Hence, it is my judgment that the damages for the delay in returning the moulds amounts to:

RM387,060
\+ RM122,670
RM509,730

At this point, it is pertinent to note that the defendant had not disputed the plaintiffs' computation of these losses. The defendant however was challenging their liability to pay these sums. Since I had earlier found the defendant liable, I therefore accept the plaintiffs' computation supported by documentary evidence and unchallenged by the defendant as the loss actually sustained by the plaintiffs.

(2) Compensation for 4,811 defective and B grade pairs of shoes

The defendant had agreed under the settlement agreement to accept the return of all B grade and defective shoes and to reimburse the plaintiffs for the costs of these shoes by applying the formula — costs to plaintiffs x quantity. At the time of the settlement agreement, there was a quantity of 18,768 pairs of shoes to be destroyed at the defendant's premises. After the settlement agreement, the plaintiffs had received a further 3,090 pairs of defective shoes. Of these figures, the plaintiffs had an order from the court requiring the defendant to take delivery of 699 pairs for destruction. The balance of 2,391 pairs were not included in the court order because these shoes were only received by the plaintiffs after the application for injunction was made but before the hearing date. The defendant has to date refused to take delivery of the said 2,392 pairs for destruction nor has it compensated the plaintiffs for the 3,090 pairs of shoes as provided for under the settlement agreement.

In the circumstances, it is my judgment that the defendant do take delivery of the 2,391 pairs of defective shoes and any further defective shoes received up to the date of my decision.

It was agreed by all parties in the settlement agreement dated 14 June 1994 (CABD 32) that the total number of defective shoes in the defendant's premises to be destroyed was not less than 18,278. The defendant had admitted to destroying only 16,694. This clearly leaves a figure of 1,584

unaccounted for. The defendant's assertion, that the inventory taken which showed 18,278 pairs was wrong, is acceptable. The inventory was actually taken at the defendant's premises and in the presence of the defendant's representative (DW3). Copies of the records of the inventory have been adduced into evidence (CABD 116–124, 128–142). The figure of 18,278 was confirmed by DW3. The defendant does not deny the figure but attempts to deny DW3's authority to sign the record. This last minute denial of DW3's authority to sign is totally rejected by this court. DW3 is presumed to have had the authority to sign. In any event, even the court order dated 20 September 1994 reflected this figure of 18,278. The suggestion by the defendant that some of the shoes were destroyed by termites is also rejected as there was no evidence to support this suggestion. Since the figure of 1,584 has not been accounted for, it is only proper that the defendant pays for this which according to the agreed document at CABD 146 is RM36,836.92. In addition, the plaintiffs had on 8 June 1994 returned a further 137 pairs of defective shoes to the defendant and this has not been compensated for. PW1 had in his evidence tendered the documents (CABD 43–44, 167) showing the return of the 137 pairs. This amounts to RM3,363.14. Therefore, the total compensation due to the plaintiffs for the defective shoes is as follows:

3,090 pairs	RM61,232.08	(CABD 44)
137 pairs	RM 3,363.14	(CABD 44)
1,584 pairs	RM36,836.92	(CABD 146)
4,811 pairs	RM101,432.14	

I therefore ordered the defendant to compensate the plaintiffs the sum of RM101,432.14. I also ordered the defendant to destroy the 1,584 pairs of defective shoes unaccounted for.

Counterclaim

With regard to the counterclaim, since PW1 had in his evidence admitted to owing the defendant the sum of RM366,007.64, I allowed the defendant's counterclaim in the sum of RM366,007.64. In fact, this is the exact figure claimed by DW1 in his evidence; except that he asked for a further sum of RM26,942.77 being charges for late payment. Since no evidence was led on this, I did not consider the same. There was no evidence led in respect of the rest of the counterclaim and in the light of DW1's answer to a direct question:

> Q: How much was owing to the defendant?
>
> A: RM366,007 (at p 194). This figure is accounted for after deducting RM55,180.36 under CN/610/3/94.

There was no need to consider the rest of the counterclaim.

Consideration

It is my finding that the settlement agreement (CABD 32) is a binding agreement between the plaintiffs. The intention was to resolve and determine the obligations between the parties, in particular the quality of the sports shoes manufactured by the defendant. The terms of the settlement agreement are explicit. In consideration of the first plaintiff making a partial payment, the defendant is bound to continue to accept all future defective shoes, cause the defective shoes to be destroyed and to return the moulds to the plaintiffs. By signing and accepting the terms stated in the settlement agreement, the defendant had promised the plaintiffs that it would perform its obligations stated therein. It is my finding that because of the settlement agreement, the plaintiffs were led to believe that the defendant would act accordingly and that the plaintiffs would be able to source for alternative manufacturers for the shoes in time, should the defendant return the moulds, after the first plaintiff had made the initial payment which was on 22 July 1994. It is this detriment which the plaintiffs suffered arising from the necessary alteration in their position which form the consideration for the promise. The performance by the plaintiffs in making the initial payment was sufficient consideration even if the plaintiffs were already under an obligation to the defendant to make those payments, for the plaintiffs were undertaking an additional obligation or rendering themselves liable to an increased detriment by allowing the defendant to withhold the moulds. Further, pursuant to the written agreement dated 9 March 1992, the defendant was to be responsible for replacements of the shoes to be destroyed. By signing the settlement agreement, the plaintiffs had waived the requirement of such replacements which would be detrimental to the plaintiffs in fulfilling the numerous orders placed by the plaintiffs' customers. The defendant's argument that there was no consideration for the settlement agreement and that the settlement agreement did not benefit the defendant in any way is devoid of merit. Surely if the defendant had not reaped any benefits it would not have signed the said settlement agreement anyway. I find that there was sufficient consideration moving from the plaintiffs to the defendant for the signing of the settlement agreement and that the defendant had thereby obtained the benefit of a direct obligation which it could enforce. Further, DW1 had admitted in his evidence that one of the reasons why the defendant had agreed to the settlement agreement was that it had hoped for continuing business from the plaintiffs. I am fortified in holding this view when I refer to *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd & Anor* [1978] 3 All ER 1170 where Mocatta J held that although the rule that a promise by one party to a contract to fulfill his existing contractual duty towards the other party did not constitute good consideration was still good law, so that the builders' original contractual liability to build the ship did not constitute good consideration for the agreement of 28/29 June to pay the further 10%, the increase by the builders in the amount of their letter of credit was sufficient consideration on their part for that agreement, since by agreeing to increase the letter of credit they had undertaken an additional obligation, or had rendered

A themselves liable to an increased detriment, and were not merely fulfilling their existing contractual duty.

In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, Glidewell LJ of the Court of Appeal adopted and approved a passage from *Chitty on Contracts* (25th Ed, 1983) para 173 which said:

B

> The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him: eg where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without *in fact* suffering any detriment. (Emphasis added.)

C

It is clear to me that the intention of the parties was that by signing the settlement agreement, the defendant would be gaining an advantage of continuing the relationship as expressed by DW1 in his evidence. In any case, the defendant and the plaintiffs had acted on the basis of the settlement agreement and the defendant is estopped by conduct from decrying the D settlement agreement (see *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331). In the words of Gopal Sri Ram JCA (at p 348):

> ... the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the E doctrine may be invoked. All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights.

Further, the same case is authority for the proposition that notwithstanding the fact that the plaintiffs had not pleaded estoppel, since evidence has F been let in by both parties to support this plea, the court is bound to consider the issue of estoppel.

Specific performance as opposed to damages

It is my judgment that this is a proper case for this court to exercise its G discretion to order specific performance of the settlement agreement. In *Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92, the Privy Council held that the fact that there was an alternative claim for damages in an action by the purchaser for specific performance of a contract for the sale of land could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to H exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance. Further in *Lim Sin Oo & Ors v Cheah Tjeng Siong* [1989] 2 MLJ 44, Wan Adnan J (as he then was) held that s 19 of the Specific Relief Act 1950 provides that a contract may be specifically enforced even though a sum is named in the contract as the amount to be I paid in case of its breach.

I find that this is an appropriate case where the plaintiffs could not be satisfied with pure monetary compensation. It was necessary for the protection of their reputation that the defective shoes be destroyed and not

be allowed to circulate in the market. In any case, the defendant had already been compelled by the court to specifically perform the settlement agreement at the interlocutory stage.

Was there a discharge of the settlement agreement due to breach

I find that notwithstanding the defendant's breach of the settlement agreement, the plaintiffs did not accept the defendant's breach as a discharge of the said agreement. The plaintiffs had all the while indicated their intention to treat the settlement agreement as still in force. It is trite law that if one party wrongfully repudiates a contract, the contract will not automatically come to an end. The innocent party is presented with an option to either refuse or to accept the repudiation. If it is refused, then clearly the effect or such refusal must be that the *status quo ante* is preserved intact.

Having considered all the evidence, the submissions and the authorities cited by both parties I made the following orders:

(1) I granted specific performance of the settlement agreement in that I ordered the defendant:
   (a) to take delivery of 2,391 pairs of defective shoes and any further defective shoes received up to date of judgment; and
   (b) to destroy the 1,584 pairs of defective shoes unaccounted for.

(2) I ordered the defendant to compensate the plaintiffs for all the 4,811 pairs of defective shoes amounting to RM101,432.14.

(3) I ordered the defendant to pay the plaintiffs the sum of RM509,780 as damages for loss of profit and cancelled orders.

(4) I ordered interest on items (2) and (3) at the rate of 4% per annum from the date of service of the writ to date of judgment.

(5) Costs to the plaintiffs.

I also allowed the defendant's counterclaim for RM366,007.64 with interest at 4% per annum from the date of service of the counterclaim to date of judgment and costs of the counterclaim.

Order accordingly.

Reported by Hanim Kamaruddin